2016 IL App (1st) 153281-U

THIRD DIVISION
November 9, 2016

No. 1-15-3281

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MEGAN LEE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 11 L 4399
CHICAGO TRANSIT AUTHORITY, ET AL,	)	
	)	The Honorable
Defendant-Appellee,	)	John P. Kirby
	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justice Cobbs concurred in the judgment.
Presiding Justice Fitzgerald Smith dissented.

ORDER

¶ 1 *Held*: Based on the supplied record, the trial court did not err in denying plaintiff's posttrial motion for a new trial on damages and the trial court's ruling that allowed evidence of plaintiff's prior and subsequent accidents and injuries was proper. We affirm.

¶ 2 This appeal arises from a personal injury action plaintiff Megan Lee filed against defendant Chicago Transit Authority, et al (CTA). On appeal, plaintiff contends that the trial court abused its discretion by failing to grant plaintiff a new trial on the issue of damages when the jury awarded plaintiff damages for medical bills and loss of a normal life, but failed to award her damages for pain and suffering. In addition, plaintiff contends that the trial court abused its

discretion in allowing defense counsel to cross-examine plaintiff and her physicians regarding prior and subsequent accidents that caused injuries. We affirm.

¶ 3 BACKGROUND

¶ 4 We recite only those facts necessary to decide the issues raised on appeal based upon the incomplete record provided. Some of these deficiencies will be detailed below during our analysis, but we note at the outset that we given only limited portions of the transcript from the jury trial. This case arises from injuries plaintiff sustained in June 2010 when she was a front seat passenger in a 2006 Chevy Cobalt driven by Keith Bounds[1] that was sideswiped by defendant's bus. Immediately following the incident, plaintiff underwent treatment at Edward Hospital Emergency Department, where she was diagnosed with cervical and lumbar strains. Thereafter, plaintiff returned home to Louisiana and underwent treatment with Richard Kamm, Sr., M.D., a general practitioner, Britain Auer, M.D., an orthopedic surgeon, and Dr. Grady Stimits, a chiropractor.

¶ 5 In April 2011, plaintiff, along with Bounds, commenced this action alleging negligence against defendant. In the amended complaint, plaintiff alleged, in pertinent part, that defendant's bus collided with Bound's vehicle while it was stopped at a stoplight. Further, plaintiff alleged that as a result of defendant's negligent conduct, she sustained personal and pecuniary injuries which caused her to endure present and future pain and suffering, including disfigurement, disability and loss of a normal life. During discovery, plaintiff filed motions *in limine* to bar reference to prior *and* subsequent automobile accidents. The trial court denied the motions and ruled that plaintiff and her treating doctors could be examined regarding an accident that occurred three and a half years prior to the incident as well as two subsequent automobile accidents in August 2010 and December 2012.

[1] Though his name is mentioned mostly in passing in plaintiff's briefs, the record did include a separate verdict form for him in which Bounds (represented by the same counsel) was awarded $449,997.71 in damages by the same jury that heard plaintiff's complaint. That verdict included $75,000 for his pain and suffering. He is not a party to this appeal.

¶ 6 As alluded to above, the direct examination of plaintiff is not contained in the record on appeal, but the supplied cross-examination revealed that although she was actually a passenger in Bound's vehicle at the time of the incident, she told the responding police and emergency room staff that she was the driver. She did report to the hospital staff that she was in a prior automobile accident, but could not recall how the prior accident occurred. In addition, she admitted that she failed to disclose her prior personal injuries in her interrogatories. Further, in August 2010, plaintiff was the driver in a subsequent accident where she hit a truck and her vehicle spun, rolling back into the guardrail. Plaintiff alleged that she never told her physician, Dr. Kamm, that she had increased pain following the August accident, even though she testified contrarily in her discovery deposition. Plaintiff was also involved in another automobile accident in December 2012, where she "collided with another vehicle." And although Dr. Kamm's notes suggest plaintiff reported that her low-back pain had increased since the December accident, she testified that it had remained the same. She testified that she didn't then need prescription medication, but was taking over-the-counter medications and used a heating pad.

¶ 7 Dr. Kamm testified that when he first treated plaintiff she had headaches and experienced pain and swelling with limited mobility in her cervical region and lumbar region. He concluded that all her injuries were "more probable than not related to the automobile accident" in June. He advised plaintiff not to do any heavy lifting and prescribed her the anti-inflammatory Mobic, muscle relaxer Soma, and pain medication Percocet. As plaintiff was already a patient of Dr. Stimits, Dr. Kamm encouraged plaintiff to continue with her chiropractic sessions. Following her subsequent accident in August 2010, Dr. Kamm observed that plaintiff's injuries "directly related to the bus accident *** but that each had been exacerbated or made worse by the

automobile accident occurring [in] August." Dr. Kamm then recommended that plaintiff see Dr. Auer for an MRI of the cervical, thoracic and lumbar spine, which came back negative. A year later, it was unclear to Dr. Kamm why plaintiff was still complaining of pain because a soft tissue sprain usually resolved within 6 to 8 weeks. Thus, Dr. Kamm recommended on several occasions that plaintiff follow-up with Dr. Auer or a neurosurgeon, a recommendation which wasn't followed. Dr. Kamm treated plaintiff through May 2014 and she continued to complain of chronic pain. In his opinion, the subsequent accidents in August 2010 and December 2012 "exacerbated or continued to cause symptoms to continue." On cross-examination, Dr. Kamm agreed that if plaintiff had a preexisting condition prior to the June incident, the pain would have been an aggravation of her pre-existing condition.

¶ 8 Dr. Auer testified that he diagnosed plaintiff with spondylolisthesis and believed the June 2010 accident was the likely cause. Plaintiff failed to disclose her prior automobile accident, but she did report the accident occurred just two months after the accident at issue. Plaintiff complained of pain while doing day-to-day activities, such as cooking and cleaning. Dr. Auer recommended that plaintiff follow-up after her MRI to further assess her condition, but she failed to do so.

¶ 9 Jerry Bauer, M.D., defendant's medical expert, testified that he examined plaintiff's medical records, imaging studies and discovery depositions, and diagnosed plaintiff with *subjective* pain in her spine, headaches and anxiety, which he attributed to the bus accident. He did not have plaintiff's medical records relating to her prior automobile accident to consider. Dr. Bauer concluded that plaintiff did not have spondylolisthesis and further opined that three years of treatment for neck and back pain was excessive. He further determined that plaintiff did not

sustain permanent injury from the incident and would not require any future treatment, including physical therapy, medication, or back surgery.

¶ 10 Subsequently, the jury returned an itemized verdict in favor of plaintiff and awarded her $6,871 for past medical expenses and $1,200 for loss of normal life. The jury awarded no money damages for pain and suffering experienced prior to trial, future pain and suffering or future loss of a normal life. Thereafter, plaintiff filed a posttrial motion contending that the damages award was inconsistent, entitling her to a new trial on damages. Plaintiff also complained that she was prejudiced by evidence of her prior and post automobile accidents and injuries. The trial court held a hearing, also conspicuously absent in the record on appeal and denied plaintiff's request for a new trial. This timely appeal followed.

¶ 11 ANALYSIS

¶ 12 On appeal, plaintiff contends that the trial court abused its discretion by failing to grant a new trial on damages when the jury inconsistently awarded plaintiff damages for medical bills and loss of a normal life, but failed to award any damages for pain and suffering. We review a trial court's ruling on a posttrial motion for a new trial on an abuse of discretion standard. *Dixon v. Union Pacific Railroad Co.*, 383 Ill. App. 3d 453, 470 (2008). In determining whether the trial court abused its discretion, "the reviewing court should consider whether the jury's verdict was supported by the evidence." *Maple v. Gustafson*, 151 Ill. 2d 445, 455 (1992). In addition, the reviewing court must consider that "[t]he presiding judge in passing upon the motion for a new trial has the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility." *Stamp v. Sylvan*, 391 Ill. App. 3d 117, 123 (2009). "If the trial judge, in the exercise of his discretion, finds that the verdict is against the manifest weight of the evidence, he should grant a new trial." *Snover v. McGraw*, 172 Ill. 2d 438, 456 (1996). Accordingly, a verdict is against the manifest

weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any evidence." *Id.* at 454. The reviewing court will not upset a jury's award of damages "unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss suffered." *Gill v. Foster*, 157 Ill. 2d 304, 315 (1993).

¶ 13 As we initially observed, plaintiff failed to provide us with a complete record on appeal, as such, we must first determine whether this hinders our resolution of this issue. Under Illinois law, "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984); See Ill. Sup. Ct. R. 323 (eff. Dec. 13, 2005). Further, any doubts which may arise from the incompleteness of the record will be resolved against the appellant. *In re Marriage of Baniak*, 2011 IL App (1st) 092017, ¶ 30; *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 157 (2005). While plaintiff supplied a decidedly incomplete record, we still find that we are able to reach the merits of the claims on appeal.

¶ 14 Plaintiff's overarching claim is that her claim for past and future pain and suffering was proved and ignored by the jury, entitling her to a new trial. Defendant responds that the absence of such an award is appropriate in this case, based upon the testimony and medical evidence offered at trial, citing *Snover v. McGraw*, 172 Ill. 2d 438 (1996). We agree. Prior to *Snover*, a line of Illinois cases held that an award for medical expenses without an award for pain and suffering and/or disability and disfigurement required reversal *per se*. See *Slavin v. Saltzman*, 268 Ill. App. 3d 392, 403 (1994); *Sands v. Glass*, 267 Ill. App. 3d 45, 50-51 (1994); *Martin v. Cain*, 219 Ill. App. 3d 110, 115 (1991); *Kumorek v. Moyers*, 203 Ill. App. 3d 908, 913 (1990). In

Snover, however, our supreme court rejected the *per se* rule, holding that "a jury may award pain-related medical expenses and may also determine that the evidence of pain and suffering was insufficient to support a monetary award." *Snover*, 172 Ill. 2d at 448. The supreme court concluded that "it lies within the jury's power and discretion to award nothing for pain and suffering in this circumstance where the evidence supports such an award." *Id.* Specifically, after examining the plaintiff's testimony on pain and suffering presented at trial, the supreme court determined that the "jury was well within the confines of the evidence in concluding that [the plaintiff] suffered only minimal discomfort." *Id.* at 449.

¶ 15 This reasoning is well suited for an analysis of the damages evidence heard by this jury, which was full of inconsistencies and quite consistent with a jury finding that plaintiff was not a very credible witness regarding her claim of pain and suffering. The jury was well within its purview to determine that plaintiff's pain and suffering was insignificant, if not blatantly exaggerated. Understandably, the only medical evidence related to pain and suffering articulated as being subjective, meaning that it was in the medical record because plaintiff said she was experiencing pain, not because it was established by any medical testing or diagnosis. See *Murray v. Philpot*, 305 Ill. App. 3d 513, 516 (1999) ("a jury is free to find plaintiff's evidence of pain and suffering to be unconvincing when plaintiff's evidence is primarily subjective"). Furthermore, the record reveals plenty of evidence of plaintiff being less than credible. Remarkably enough, these issues started at the scene of the accident where she falsely claimed to be the driver of the vehicle in which she was a passenger. Other credibility deficiencies were noted in plaintiff's testimony and in her answers to interrogatories. Medical testimony by her own physicians also revealed significant inaccuracies in the history provided by plaintiff while under treatment. The jury's verdict can be properly interpreted as their finding that plaintiff

required some medical treatment that interfered with her normal life activities for a while, but did not cause her any notable pain and suffering. See *Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 491(2008) (when the circumstances allow a jury may award an internally inconsistent verdict); *Zuder v. Gibson*, 288 Ill. App. 329, 334 (1997) (based on the "conflicting evidence relating to the nature and extent of the plaintiff's loss of normal life and disfigurement," the reviewing court concluded that "the jury's decision not to award damages for these categories was well within the confines of the evidence"). Finally, as mentioned above, co-plaintiff Bounds was awarded a substantial amount of damages for pain and suffering, so it is abundantly clear that this jury simply did not credit plaintiff's claim for past and future pain. As a result, we find that the trial court did not abuse its discretion in denying plaintiff's posttrial motion. See *Snover*, 172 Ill. 2d at 449 (a reviewing court should not reverse the trial court's ruling on a posttrial motion absent an abuse of discretion).

¶ 16 Plaintiff next contends that the trial court abused its discretion in allowing defendant's counsel to cross-examine plaintiff and her physicians regarding a prior automobile accident and two subsequent automobile accidents. Before evidence of prior injuries may be admitted at a trial, the defendant must first present medical or other competent evidence to establish a causal connection between the evidence offered and the complained-of injury. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 646 (2010). For a prior injury to be relevant to causation, the injury must make it less likely that the defendant's actions caused any of the plaintiff's injuries. *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 58 (2000). Even if the prior injury does not negate causation, it could still be relevant to the issue of damages if it could establish that the plaintiff had a preexisting condition for which the defendant is not liable, thus reducing damages. *Id.* Further, "a prior injury may be relevant as impeachment," including questioning the plaintiff "with respect to

[her] failure to disclose to her physician that [she] has suffered an injury to the same body part," or asking an expert "whether his opinion would change if the expert was aware of the plaintiff's prior injury." *Id.* The decision of whether to admit or exclude evidence, including whether to allow an expert to present certain opinions, rests solely within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 36-37 (2010).

¶ 17 Based upon the testimony about injuries that the jury heard at trial, we cannot say the trial court's determination was in any way unreasonable. In *Felber v. London*, 346 Ill. App. 3d 188, 193 (2004), the reviewing court concluded that allowing the defendant driver to present evidence of the plaintiff motorist's prior injuries without expert testimony on causation was not reversible error *per se* because the plaintiff's treating physician's testimony about the effects of an accident on the plaintiff's preexisting condition eliminated the need for additional expert testimony. The court noted that "the evidence in this case is such that the jurors could readily appraise the relationship between the injuries of which [the plaintiff] complained after the collision and her preexisting injuries without additional expert assistance." *Id.* at 193

¶ 18 Further, in *Kayman v. Rasheed*, 2015 IL App (1st) 132631 ¶ 61, although the defendant did not present expert testimony to support the admission of the plaintiff's prior injury, the plaintiff voluntarily chose to testify that she had no history of prior back complaints. Thus, the trial court allowed the plaintiff's prior complaints into evidence as prior inconsistent statements, which were referenced in the plaintiff's doctor's deposition. The *Kayman* court noted that "[s]uch evidence would impeach [the plaintiff's] credibility, creating a basis for admission independent of the substantive issue of causation." *Id.* at ¶ 62.

¶ 19 In the case *sub judice*, Dr. Kamm, who treated plaintiff for several years, testified to plaintiff's pain increasing after the subsequent accidents and surmised that if plaintiff had informed him of her persistent back pain from a prior injury when they began treatment, he would have concluded that the injuries were due to a combination of her prior accident and the bus accident. Thus, as in *Felber*, Dr. Kamm's testimony obviated the need for additional expert testimony. Further, evidence of plaintiff's prior and subsequent injuries was admissible as impeachment of plaintiff's prior inconsistent statements. During plaintiff's cross-examination, plaintiff repeatedly admitted that she misrepresented facts. For instance, as in *Kayman*, plaintiff claimed that she never told Dr. Kamm that the August, 2010 accident caused additional pain, even though she specifically testified to this during her discovery deposition. Furthermore, although plaintiff testified that her low-back pain did not increase after the December 2012 accident, Dr. Kamm's notes suggested otherwise. Moreover, although plaintiff argues that this line of questioning lacked a good-faith basis as it was not disclosed during discovery, plaintiff failed to provide a complete record on appeal, including Dr. Bauer's discovery deposition, and thus, we need not consider this contention further. See *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007) (the burden of a sufficient record falls on the appellant and issues that are insufficiently presented are considered waived). Consequently, we cannot say the trial court abused it discretion in allowing plaintiff's prior and subsequent automobile accidents and injuries into evidence. See *Boersma v. Amoco Oil Co.*, 276 Ill. App. 3d 638, 648 (1995) (the admission of evidence rests largely within the sound discretion of the trial court and its decision will not be reversed unless that discretion has been clearly abused).

¶ 20 CONCLUSION

¶ 21 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.

¶ 23 JUSTICE FITZGERALD SMITH, dissenting:

¶ 24 I respectfully dissent from the majority's position in this cause.

¶ 25 Although the facts indicate that plaintiff did herself no service, the law is still the law.

¶ 26 In this case, in contrast to *Snover v. McGraw*, 172 Ill. 2d 438 (1996), it is difficult for me to see "0" damages for pain and suffering for a period of four to six weeks, but at the same time an award of medical expenses for the same period. Instead, I feel that *Sands v. Glass*, 267 Ill. App. 3d 45 (1994), and *Slavin v. Saltzman*, 268 Ill. App. 3d 392 (1994), are still instructive on the issue of objective evidence to plaintiff's subjective complaints, which were already admitted by defendant's medical expert, Dr. Bauer.

¶ 27 As in *Snover*, the Illinois Supreme Court "emphasized that in other cases, an award of medical expenses without a corresponding award for pain and suffering may be inappropriate." *Snover*, 172 Ill. 2d at 449. So stated, the lack of an award by the jury and the judge ignores a proven element of damages, resulting in irreconcilable inconsistencies and is, therefore, inappropriate.

¶ 28 Therefore, in my view, this case should be remanded for a new trial on damages.